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LaRIVIERE, GRUBMAN & PAYNE, LLP
P.O. BOX 3140
MONTEREY,, CA 93942

EXAMINER

DEBERADINIS, ROBERT L

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/735,697
Filing Date: December 12, 2000
Appellant(s): LEE, NOEL

DAVID F. LaRIVIERE
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/9/06 appealing from the Office action
mailed 6/14/05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Des.401,220	DWIGHT	11-1998
US 5,775,935	BARNA	07-1998
US 5,708,554	LINER	01-1998
US 5,899,761	CRANE	05-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 49, 52, 56, 57, 58-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over DWIGHT Des. 401,220 in view of BARNA 5,775,935.

Regarding claims 49, 56, 58-62.

DWIGHT discloses a design patent disclosing a power strip housing having a plurality of colored areas (different hatching indicating different colors).

DWIGHT does not teach the colored areas are for selectively identifying each outlet of said power distribution outlets.

BARNA discloses system and method using a color coded tag to tag a power cable (column 5, lines 26-45) of a device wherein the color of the power cord connection cable corresponds with the color of the color coded alignment strip (column 5, lines 15-17) and that the colors located near or proximate to the connection port aids a user in determining which cable should be connected with the corresponding connection port (column 5, lines 60-62).

It would have been obvious to one having ordinary skill in the art at the time of this invention to tag a power cord with the corresponding color of the power outlet on the power strip disclosed by DWIGHT. The motivation would be to provide an indication as to which device is not plugged into the power strip (column 6, lines 27, 28).

Regarding claim 52.

DWIGHT in view of BARNA disclose the AC power distribution system as recited in claim 49.

DWIGHT discloses wherein the power strip includes at least one telephone jack (figure 7).

Regarding claim 57.

DWIGHT in view of BARNA disclose the AC power distribution system as recited in claim 49.

BARNA discloses color cords having colors corresponding to the colors of said color areas (column 5, lines 2-18).

Claims 50, 51, 54, 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over DWIGHT Des. 401,220 in view of BARNA 5,775,935 in further view of LINER 5,708,554.

Regarding claims 50, 51.

DWIGHT in view of BARNA disclose the AC power distribution system as recited in claim 49.

DWIGHT in view of BARNA does not disclose an outlet of greater size than each of substantially identical AC power distribution outlets.

LINER discloses a power outlet box having an oversized outlet in that it is spaced from other outlets to allow an over size plug to be inserted (column 1, lines 34-38).

It would have been obvious to one having ordinary skill in the art at the time of this invention to modify the power strip to include an oversized outlet. The motivation would be to insert an oversized plug into the power strip.

Regarding claim 54.

LINER discloses main power switch 18 used for turning power on and off to the power outlet box.

Regarding claim 55.

LINER discloses indicator light L1.

Claim 53 is rejected under 35 U.S.C. 103(a) as being unpatentable over DWIGHT Des. 401,220 in view of BARNA 5,775,935 in further view of CRANE 5,899,761.

Regarding claim 53.

DWIGHT in view of BARNA disclose the AC power distribution system as recited in claim 49.

DWIGHT in view of BARNA does not disclose at least one coaxial cable jack.

CRANE discloses a power strip including coaxial plug 72.

It would have been obvious to one having ordinary skill in the art at the time of this invention to modify the power strip disclosed by DWIGHT in view of BARNA to include at least one coaxial cable jack. The motivation would be to provide at least one coaxial line interface.

(10) Response to Argument

Applicant's arguments filed 3/14/05 have been fully considered but they are not persuasive.

On page 14 lines 10-20 it is argued that none of the references teach solid color-coding of substantially identical outlets. This is not supported by claim language, the claims, e.g. 49, require "a housing having a plurality of substantially identical AC power distribution outlets... said housing having a plurality of colored areas..." this argument is not supported by the claim language. Please note Dwight discloses a housing having colored areas, which meet this claim limitation. It is additionally argued that the outlets are substantially identical. Dwight also discloses this feature.

On page 19 lines 35 plus it is argued that the colored area proximate to each outlet is not for selectively identifying each outlet of said power strip and providing color indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area. Please note BARNA teaches a system includes a color coded alignment strip that has a surface of colors arranged in ordered positions on the strip. The colors of the surface correspond to color coded cables (abstract).

On page 24 lines 24 plus it is argued that DWIGHT merely comprises thin colored rings disposed at a notable radius away from the outlets; BARNA merely teaches the use of a hardwired pattern template applied to a credit card terminal and only serves to illustrate the problem with visual identification; LINER merely teaches an oversized outlet and that in fact the references teach away from the present invention. This argument is not supported by claim language. DWIGHT teaches a housing having a plurality of substantially identical AC power distribution outlets for connecting AC electrical power to a plurality of devices, said housing having a plurality of colored areas. BARNS teaches color coding cables having electrical connection ports that are to receive the color coded cables of the corresponding colors aligned with the electrical connection ports (abstract). LINER teaches an oversize outlet in that it is spaced from the other outlets to allow an over size plug, such as are part of a voltage reducing transformer (column 1, lines 33-35).

The Applicant requests the Examiner to consider the affidavits presented by Noel Lee, Karen Johnson, and Albert Mehrabian.

Regarding the Noel Lee 131 affidavit. Paragraphs 1, 5, and 7 are the only paragraphs of the affidavit that support applicant's attempt to establish an earlier date of invention. MPEP 715.07 states that "the essential thing to be shown under 37 CFR 1.131 is priority of invention and this may be done by any satisfactory evidence of the fact." Further, "general allegation that the invention was completed prior to the date of the reference is not sufficient". MPEP 715.07(III) states:

" The affidavit or declaration must state FACTS and produce such documentary evidence and exhibits in support thereof as are available to show conception and completion of invention in this country or in a NAFTA or a WTO member country (MPEP 715.07(c)), at least the conception being at a date prior to the effective date of the reference. Where there has not been reduction to practice prior to the date of the reference, the applicant or patent owner must also show diligence in the completion of his or her invention from a tie just prior to the date of reference continuously up to the date of an actual reduction to practice or up to the date of filing his or her application."

In paragraph 7 declarant states conception took place in 1993 and reduction to practice occurred in 1997. No evidence is provided to support these allegations. Diligence is not addressed at all in this affidavit. In fact the only evidence supplied is a figure with no date in support of either conception or reduction to practice. Since no evidence regarding the date of conception or the demonstration of diligence has been provided, this declaration is insufficient to establish a prior date of invention to the Dwight reference. It is noted that the 131 affidavit was submitted to address a different

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reference from Monster's competitor Acco Brands Inc. The issues are the same with respect to the Dwight reference, also assigned to Acco.

In paragraph 6 declarant states Mr. David Pitcher was an employee of Monster and later moved to Acco. The declarant asserts that Mr. Pitcher took proprietary information from Monster and disclosed it in Acco. Such an attempt to prove derivation is treatable under CFR 132. Since the currently applied reference to Dwight does not name Mr. Pitcher, this assertion is not deemed supported by claim language to the currently applied rejection.

Regarding Noel Lee's affidavit under 37CFR 1.132 demonstrating commercial success. The MPEP states

I. >< NEXUS BETWEEN CLAIMED INVENTION AND EVIDENCE OF COMMERCIAL SUCCESS REQUIRED

An applicant who is asserting commercial success to support its contention of nonobviousness bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success.

The Federal Circuit has acknowledged that applicant bears the burden of establishing nexus, stating:

In the *ex parte* process of examining a patent application, however, the PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion that the sale constitute commercial success. *C.f. Ex parte Remark*, 15 USPQ2d 1498, 1503 (Bd. Pat. App. & Int. 1990)(evidentiary routine of shifting burdens in civil proceedings inappropriate in *ex parte* prosecution proceedings because examiner has no available means for adducing evidence). Consequently, the PTO must rely upon the applicant to provide hard evidence of commercial success.

Noel Lee's affidavit that states commercial success was demonstrated by this product improvement is not convincing. It fails to identify what the unit sales in similar markets

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were before this produce line was introduced, whether a product line was replaced with this newer product line, what alternatives were available to this product line and how introduction of this new line impacted the alternatives sales. Without this information it is impossible to evaluate the merits of the numbers discussed in the affidavit. For example, if the market for power strips were 20 million units per year, than under $\frac{1}{2}$ million units would be deemed more significant. If this product line merely replaced an existing product line then the sales of the prior product line should be identified to determine if an increase in sales occurred. Also deficient is the information on what alternatives existed and what their sales numbers were, and how they were impacted when this product appeared. The assertion that a store stopped selling a competitor's products is not necessarily an indication that this applicant's product improvement was the reason. Perhaps the competitor and the store had other problems.

Applicant indicates the product line was promptly copied by a competitor at line 29. The statement is not persuasive, applicant identified its competitor's product as disclosed in Dwight. Dwight is prior art to this application. One cannot show coping using references that predate ones own invention. Instead this appears to show that both companies believed that this was a marketable concept and both were working on designs in this field. It is noted that the 131(a) affidavit of Noel LEE indicated that conception of color-coded power strip was to have occurred in 1993 but it was not reduced to practice until 1997. It is unclear if applicant is attempting to prove either derivation or to disqualify the Dwight reference. To prove prior invention one must prove conception prior to the prior art's effective date and must prove diligence. The only proof offered in this affidavit is a

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copy of a drawing signed by Mr. Pitcher in 1994. MPEP 715.07 states that "the essential thing to be shown under 37 CFR 1.131 is priority of invention and this may be done by any satisfactory evidence of fact." The drawing signed by Mr. Pitcher is not evidence of conception by Noel Lee. Nor is evidence provide regarding diligence to reduce this invention to practice. This affidavit is therefore ineffective to predate the Dwight reference. As to whether Mr. Pitcher derived his invention from Noel Lee's work product is likewise unsupported by evidence of fact. Please note that derivation is proper in a 132 affidavit not in a 131 affidavit, but the issue will be address here.

The Examiner's prior art of record teaches a color power strip and a color coded process for identifying a cord plug interface. The Applicant argues that his color coded plug strip is substantially more prominent to the eye than the cited art color rings or strips. The applicant further argues that his invention has more flexibility than does the prior art teachings. The Examiner maintains his rejection because the invention is obvious in view of the teaching of the prior art.

Applicant claims (page 9) that the Examiner by not finding the Declarations persuasive "suggests that this is an impermissible shifting of the burden of proof and that these topics are asserted in the Declarations".

Applicant claims (page 14) "the Examiner has not shown that the combination of the disclosures taken as a whole suggest the claimed invention" and "even if the concept of color-coding, in general, has been known, the concept of solid color-coding has never been applied to substantially identical outlets of a plug strip apparatus until the present invention".

The Applicant does not claim solid color-coding. The Applicant claims "color areas".

DWIGHT discloses substantially identical outlets of a plug strip apparatus having different color areas around substantially identical outlets. The color areas around the substantially identical outlets obviously have the property of identifying substantially identical outlets from one another, merely having different colors around substantially identical outlets obviously has an identifying property of identifying an outlet by the color area around the outlet.

BARNS discloses connecting color coded cables to a device by matching a color cable to a color connector. BARNS teaches matching an input cable to a color.

The obvious observation having the DWIGHT'S plug strip and having the need to identify devices plugged into the strip would be to match the device input plug with the color around the outlet.

The Applicant argues that full weight should have been given to Expert Witness, Dr. Mehrabian's Declaration, which states that that there is a "substantial advantage in using solid colors of high chroma" which supports patentability in that "expected beneficial results are evidence of obviousness just as unexpected results are evidence of unobviousness.

The Applicant does not claim "solid colors" or "high chroma" nor does the specification support this argument.

The Applicant argues the motivation to combine, is well settled that, for a cited art reference to render obvious a claimed invention, the combination of claimed elements

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must be taught, motivated, or suggested by the cited art. The Applicant continues with the limitations that patentable distinguish claim 49 from DWIGHT even in view of BARNA are:

“a housing having a plurality of substantially identical Ac power distribution outlets for connecting AC electrical power to a plurality of devices”

DWIGHT discloses a power strip having a plurality of substantially identical power outlets for connecting AC electrical power to a plurality of devices.

“said housing having a plurality of colored areas for selectively identifying each outlet of said power distribution outlets”.

DWIGHT discloses colored rings illustrated by the hatch marks around different substantially identical outlets. The MPEP 808.02 defines hatch markings to represent color markings on a non-color document.

BARNS discloses connecting color coded cables to a device by matching a color cable to a color connector.

The Examiner believes his rejection using DWIGHT in view of BARNA disclose the above limitation.

“each colored area of said colored areas on said housing being different in color from any other such area”.

DWIGHT discloses the above limitation by illustrating different hatch rings around different substantially identical outlets.

“each of said colored areas assigned to a different device”.

BARNA discloses connecting color coded cables to a device by matching a color cable to a color connector. The act of plugging a device into a color outlet assigns that outlet to the device.

The Examiner believes his rejection of claim 49 using DWIGHT in view of BARNA disclose the above limitations.

The Applicant argues "BARNA only serves to illustrate the problem with visual identification...and does not include the present human factors feature for facilitating identification of substantially identical outlets by solid color-coding".

The Examiner refers to BARNA for the teaching of connecting color-coded cables to a device by matching a color cable to a color connector. DWIGHT discloses colored rings illustrated by the hatch marks around different substantially identical outlets.

The Applicant continues to attack the Examiner's motivation, supplies pages of case law to support his position and concludes and suggests that the examiners who worked on this case have engaged in impermissible hindsight reconstruction of the prior art.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper.

See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

The Examiner upholds this rejection based on the teaching of the prior art.

The Applicant argues that "DWIGHT does not teach the colored areas are for selectively identifying each outlet. Moreover, DWIGHT'S color elements are merely ornamental rather than functional colored rings". Neither reference nor the combination of these references teaches, suggests, nor motivates a utilitarian solid-color coding feature for substantially identical outlets as is claimed in the present invention.

The Examiner argues that the mere orientation of the colored ring around an outlet obviously identifies a substantially identical outlet from another substantially identical outlet having a different color ring.

The Applicant misinterprets *In re Seid*. *In re Seid* held that an ornamental limitation does not patentably distinguish a given combination of claimed elements over prior art that teaches that combination of claimed elements. Applicant however argues a design patent cannot anticipate a utility claim limitation. This is not the teaching of *In re Seid*. Any reference, including design references, is interpreted by what it would teach to one of ordinary skill in the art at the time of the invention. Under this standard the combined references meet the claimed limitations.

DWIGHT discloses a power strip having a plurality of substantially identical power outlets for connecting AC electrical power to a plurality of devices.

DWIGHT also teaches colored rings illustrated by the hatch marks around different substantially identical outlets. The MPEP 808.02 defines hatch markings to represent color markings on a non-color document.

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BARNA discloses connecting color coded cables to a device by matching a color cable to a color connector

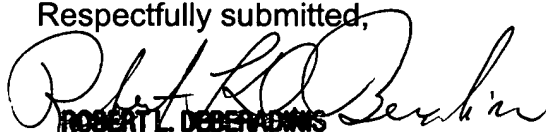
It would have been obvious to one of ordinary skill in the art at the time of this invention to combine the teachings of DWIGHT with the teachings of BARNA to color code a cable with a color that corresponds to the outlet color on the plug strip to assign a device to a outlet.

(11) Related Proceeding(s) Appendix


No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


ROBERT L. DEBERNADIS
PRIMARY EXAMINER

Conferees:


BRIAN SIRCUS
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 2800


DREW A. DUNN
SUPERVISORY PATENT EXAMINER